IN THE

Supreme Court of the United States

October Term, 1944.

No. .....

THE ENOCH PRATT FREE LIBRARY OF BALTIMORE CITY, THOMAS S. CULLEN, HENRY STOCKBRIDGE, III, BLANCHARD RANDALL, JR., WILLIAM J. CASEY, ALBERT D. HUTZLER, ROBERT W. WILLIAMS, WILLIAM G. BAKER, JR., JOSEPH L. WHEELER, JAMES A. GARY, JR. AND HENRY DUFFY,

Petitioners,

v.

T. HENDERSON KERR AND LOUISE KERR,

Respondents.

BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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Attorneys for Petitioners.

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OPINION BELOW.

The opinion of the Circuit Court of Appeals, filed April 17, 1945, is not yet reported, but is included in the record (Record p. 221).

GROUNDS FOR JURISDICTION.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C., Sec. 347 (a)); United States Constitution Fourteenth Amendment, Sec. 1; Civil Rights Act, 8 U. S. C., Secs. 41 and 43; the Declaratory Judgments Act, 28 U. S. C., Sec. 400; Maryland Declaration of Rights, Art. 43; Maryland Constitution Art. 3, Sec. 48.

The order or decree of the Circuit Court of Appeals for the Fourth Circuit was entered April 17, 1945 and upon application, said Court on May 8, 1945, ordered that the mandate be stayed for thirty days pending the application for writ of certiorari in this Court.

A concise statement of the grounds on which the jurisdiction of this Court is invoked is contained in the Petition, reference to which is hereby respectfully made.

STATEMENT OF CASE.

The Trustees of The Enoch Pratt Free Library in Baltimore constitute a Maryland corporation under the name "The Enoch Pratt Free Library of Baltimore City," created by special act of the General Assembly of Maryland at the behest of the founder and original donor of the Library, the philanthropist, Enoch Pratt. All of its activities and functions are trust duties imposed upon it pursuant to the terms of the trust specified by this private settlor. It is, however, now largely financed by grants of money appropriated in its aid by the City of Baltimore. The original trustees were selected and designated by Enoch Pratt; they were named as such in the enabling Act—Chapter 181, Acts of 1882 (Record p. 191) and they have perpetual succession and the power to fill all vacancies occurring on their board. The trustees so incorporated are empowered by the statutory charter "to do

all necessary things for the control and management of the Library"; to expend its funds, resulting from private endowments and from the appropriations made by Baltimore City for its aid, "in such manner as they shall think proper and to make all necessary * * * regulations * * * for the appointment of the necessary officers and agents." Such discretion in the Trustees as to the management of the Library is part of a binding contract between Enoch Pratt, the Library corporation, and the City of Baltimore.

The Trustees declined to admit the plaintiff, Louise Kerr, a negress, who possessed the purely educational qualifications, to an intra-mural training course conducted by the Library for the sole purpose of preparing suitable candidates for appointment to professional positions with the Library as "library assistants". The reason, found by the trial court to be *bona fide*, for refusing to admit the plaintiff was that her training would have been futile and unnecessary, because the only two such professional positions at the Library then open to negroes were already filled by negro appointees and there were, in the judgment of the Trustees, sufficient negroes already trained in library work available to fill any vacancies in such positions that might occur.

"Library assistants" have close contact with the patrons of the Library, their principal duties being to advise such patrons, to help them find the books they require. The Trustees, in the exercise of the discretion conferred upon them and for the purpose of rendering the best library service to all the people of Baltimore, had recently opened these two positions to negro employees at the only Branch of the Library where the patrons were predominantly colored. At the Central Library and at the other branches where the patrons and members of the staff are predominantly white, the Trustees had refrained from placing negroes in the roles of advisors of the white patrons.

Thereupon the plaintiffs, Louise Kerr, and her father T. Henderson Kerr instituted this action on October 4, 1943, against the Library corporation, its Trustees and Librarian individually, and the Mayor and City Council of Baltimore. Plaintiff Louise Kerr, the applicant for admission to the training class, claimed that the action of the Library constituted a discrimination against her in violation of her civil rights. Her father, T. Henderson Kerr sued solely because of his interest in the controversy as a taxpayer of Baltimore City.

The complaint was in four counts. In the first count it was alleged, in substance, that the Library was created to perform, and it and its Board of Trustees do perform, through the use of property, the title to which is in the Mayor and City Council of Baltimore, and through employees and other facilities paid for chiefly out of public moneys, a public governmental activity of the State of Maryland; that, as an integral part of the exercise of such governmental activities, the Library, and its Trustees and Librarian, and Baltimore City, and through it the State of Maryland, have conducted a Library Training Course, primarily for the training of individuals for staff positions in the Library, from which negroes, qualified to receive such training, including the plaintiff Louise Kerr, have been excluded solely because of their race or color; that no equivalent library training course conducted with public funds and available to the plaintiff or other negroes exists in the State; that the Trustees of the Library had adopted on September 17, 1943, the following resolution:

> "Resolved that it is unnecessary and unpracticable to admit colored persons to the Training Class of the Enoch Pratt Free Library. The Trustees being advised that there are colored persons now available with adequate training for library employment have given the Librarian authority to employ such per-

sonnel where vacancies occur in a branch or branches with an established record of preponderant colored use";

and that the failure of the defendants to accept the application of plaintiff, pursuant to the policy expressed in said resolution, constituted an impairment of her civil rights guaranteed by Section 1 of the Fourteenth Amendment of the Constitution of the United States and a violation of the Federal Civil Rights Statute (U. S. C., Title 8, Sec. 41). The plaintiff Louise Kerr claimed damages against each individual defendant in the amount of $5,000.

Count Two adopted by reference all of the allegations of Count One, and therein plaintiff Louise Kerr prayed an injunction against refusal by defendants, on account of her race or color, to admit her to the training class in the future.

Count Three likewise adopted by reference all of the allegations of Count One and Count Two and therein both plaintiffs prayed for a declaratory judgment to establish the right of the plaintiff Louise Kerr to have her application for admission to the training class in the future received and considered by the defendants without discrimination because of her race or color.

Count Four alleged that the Mayor and City Council of Baltimore transfers each year a large amount of public moneys to the Library and that, if the Library is a private corporation, such appropriations in excess of $100,000 annually (resulting from private endowments) are *ultra vires* and constitute the taking of the property of the plaintiff T. Henderson Kerr, a taxpayer, without due process of law, and therein plaintiff T. Henderson Kerr prayed an injunction against payments by the City to the Library of any such public moneys derived in part out of taxes levied against him.

The answer of the Library defendants, by appropriate allegations, in substance denied that the functions performed by them constituted state or governmental activities, and denied that the plaintiff Louise Kerr had been refused admission to the training class because of her race or color, but, on the other hand, because, there being no positions on the Library staff open to negroes which were not already filled by negro appointees and no lack of negroes already trained for library service available to fill any vacancies which might occur in such positions, her admission to the training class would be impractical, unnecessary, futile and unfair to her and that, therefore, their refusal to admit the plaintiff Louise Kerr did not constitute an unlawful discrimination.

The answer of the Mayor and City Council of Baltimore asserted that its appropriations in aid of the Library project did not deprive the plaintiff T. Henderson Kerr of his property without due process of law.

No demand having been made by any party for trial by jury, the case was tried before the Court (District Judge Chesnut), Testimony was heard. All relevant documents, including state statutes, city ordinances, resolutions, minutes and correspondence were received in evidence under a stipulation of counsel dispensing with formal proof thereof. At the conclusion of the trial the District Court, in a careful opinion, found from the evidence: (1) that the action of the Library defendants in refusing the plaintiff Louise Kerr admission to the training class was private corporate action and not State action and hence not within the provisions of the Fourteenth Amendment and of the Federal Civil Rights Act; (2) that, nevertheless, the policy and practice of the Library defendants in selecting only white persons for "library assistants," except at Branch No. 1 where the patrons were predominantly colored persons, was not due

to prejudice or discrimination against negroes, but in the exercise of their best judgment in the selection of employees for the service to be rendered and in consideration of the predominate patronage by white persons at the Central and all other branches of the Library except Branch No. 1; (3) that the refusal by the Library defendants to admit the plaintiff to the training class, which was conducted purely as an intra-mural feature of the Library for the instruction of its prospective employees and not as a general library training course, was not based solely on account of the plaintiff's race or color but was in good faith; and (4) that the appropriations by the Mayor and City Council, authorized by statute for the aid and benefit of the Library corporation, were valid and did not deprive the plaintiff T. Henderson Kerr of his property without due process of law.

The District Court thereupon made appropriate findings of fact and conclusions of law and entered a judgment dismissing the complaint, from which the appeal was prosecuted to the Circuit Court of Appeals.

The issues before that Court was therefore whether the District Court erred in holding:

1. The refusal of the Library defendants to admit the plaintiff Louise Kerr to the Library Training Course was private corporate action and not State action.

2. The refusal of the Library defendants to admit the plaintiff Louise Kerr to the Library Training Course was based on reasonable grounds and did not constitute an unlawful discrimination against her.

3. The payments by Baltimore City to the Library of money appropriated by the City for its aid did not deprive the plaintiff T. Henderson Kerr of his property without due process of law.

SPECIFICATIONS OF ERRORS.

A. The finding that the action of the Trustees of the Enoch Pratt Free Library in refusing admittance of a negress to its training class was State action.

B. The finding that the negress was excluded from the training class of the Enoch Pratt Free Library because of her race.

STATEMENT OF FACTS.

A. The private nature of the Enoch Pratt Library Corporation and its management; its relation to Baltimore City.

All of the functions and activities performed by the Library defendants were imposed on them as the result of the terms of a privately created trust.

The Library had its origin in the letter which Enoch Pratt wrote to the Mayor and City Council of Baltimore on January 21, 1882. In it he said that he had contemplated for some years establishing a free circulating library, to consist of a central library and branches connected with it "under the same management." He related that he had begun the construction of the central building upon his own property to cost about $225,000, the legal title to which he proposed upon completion to convey to the City together with a sum of $833,333.33 in trust for the whole people of Baltimore, "provided the City will grant and create an annuity of Fifty Thousand Dollars ($50,000) per annum forever, payable quarterly to the Board of Trustees, for the support and maintenance of the Library and its Branches."

The letter included detailed suggestions as to how the City might legally carry out its part of the plan, and contained the following:

> "I propose that a Board of nine Trustees be incorporated for the management of 'The Pratt Free Library of the City of Baltimore', the Board to be selected by myself from our best citizens, and all vacancies which shall occur, shall be filled by the Board. The articles of incorporation will contain a provision that no trustee or officer shall be appointed or removed on religious or political grounds. The Trustees are to receive from the City the quarterly payments, and to expend it at their discretion for the purposes of the Library * * *

> "The Trustees will be required to make an annual report to the Mayor and City Council of their proceedings, and of the condition of the Library, and the report will contain a full account of the money received and expended."

Two features of the plan stood out: (1) The City was merely to hold legal title to the property and to invest the endowment fund; (2) the management of the Library and the expenditure of its funds was to be committed exclusively to a private corporation consisting of the founder's own nominees and their successors chosen by them. The only state or municipal action contemplated, beyond the mere act of creating the private corporation, related to the method of the Library's financing and to the fact that the municipality should hold the Library property in trust and represent the beneficiaries of the gift, the people of Baltimore.

This was the plan, with a distinct cleavage between fiscal and managerial trust functions, which was carried out. It was embodied in a contract, legally immune from impairment, between Pratt, the Library Corporation and the City, which has been observed from that day to this. The City has had nothing to do with the management and activities of the Library or with the selection of its staff. The private corporation, acting through its Board of Trustees in carrying out the express intent of its private founder, has had everything to do with such matters.

By special act of the Maryland Legislature (Acts of 1882, ch. 181) the persons selected and designated by Pratt were constituted a corporation, and the City was enabled to accept the gift and "to contract and agree by ordinance" to carry out the fiscal features of the plan. The preamble of the statute recited, among other things, that the Trustees were to receive the annuity "for the purchase and maintenance of the said Library, with not less than four branches in different parts of the City, said

branches to be established by said Trustees * * * " and that "the control and management of the said Library and other property to be in said Board of Trustees".

Enoch Pratt and his eight associates were incorporated under the name "The Enoch Pratt Free Library of Baltimore City", and they constituted its Board of Trustees with perpetual succession and were empowered to fill any vacancies in the Board "and to do all necessary things for the control and management of said Library and its Branches * * *" and to expend its funds "for the purposes of said Library in such manner as they shall think proper and to make all necessary by-laws and regulations for the government and administration of said trust and for the appointment of the necessary officers and agents". In literal compliance with the express stipulation of Pratt, the statute contained the requirement of an annual report by the Trustees to the City of their proceedings and of the condition of the Library, and an account of the moneys received and expended by them. Since the City was obligated to pay the annuity and since it represented the indefinite class of beneficiaries of the trust, provision was also made for the appointment by the City of a Visitor to examine the Trustees' books and accounts, and the City was empowered, only however "in case of any abuse of their powers by said Trustees or their successors," to resort to the proper courts to enforce the performance of the trust.

Of the statute the District Court said in its opinion:

> "The purpose and effect of the Act was merely to ratify and approve the agreement made between Mr. Pratt and the City and to give the necessary authority of the State to the City to carry out the agreement."

So enabled, the Mayor and City Council by Ordinance No. 106, approved July 15, 1882, accepted this gift on the

donor's said terms and entered into the contract described. The ordinance also expressly provided for "the control and management of said Library and property to be in said Board of Trustees". On the theory that the undertaking of the City to pay the annuity to the Trustees might create a debt by the City to the Library Corporation, the ordinance was submitted to the legal voters of the City and its adoption was duly approved. Thus the private Library Corporation, far from being an agency of the City, was, in contemplation of these enactments, regarded as the City's obligee.

On July 2, 1883, Enoch Pratt and his wife, Pratt having completed the erection of the Library building upon his own ground on Mulberry Street, conveyed the same to the Mayor and City Council of Baltimore in trust. The Library Corporation joined in the deed for the purpose of covenanting "to appropriate entirely and solely for its corporate purposes" the annuity payments which it was to receive. The Library was formally opened to its patrons on January 4, 1886.

In 1907 the resources of the Library were further augmented as the result of a private endowment. In that year Andrew Carnegie offered to give the Mayor and City Council $500,000 for the erection of branch library buildings on sites to be furnished by the City, provided the City would also furnish funds for the maintenance of these branches in an amount not less than ten per cent. of their cost ($50,000). This offer was accepted by the City, and by Ordinance No. 275, approved May 11, 1907, the gift of $500,000 was turned over to the Library Corporation to be expended by the Trustees for the erection of the branch library buildings. These branch library buildings, twelve in number, have been occupied and managed by the Library Corporation, and the annual maintenance funds are turned over to the Trustees for disburse-

ment "in such manner as may be specified from year to year in the ordinance of Estimates". The appropriations provided for in this ordinance were made conditional upon receiving authority therefor from the State Legislature.

By the Acts of 1908, Chapter 144, general authority was given by the Maryland Legislature to the City to appropriate public funds in aid of free public libraries, in general, when the legal title to their properties should be held by the City, and in aid of The Enoch Pratt Library in particular. This statute is codified in the Charter of Baltimore City, in Article I, Sec. 6 (14A) entitled "Libraries".

Pursuant to this section of its Charter, the City, in addition to making the appropriations required by the terms of the Carnegie gift, has from time to time, in increasing amounts, rendered municipal financial aid to the Library Corporation. For a long period of time these additional annual appropriations by the City in aid of the Library Corporation were comparatively small, approximating $75,000 or $80,000. From the year 1919 on they began to grow in amount, and since 1932, when a new enlarged Central Library building was constructed and the activities of the Library were greatly expanded, the pace of their growth has been accelerated. In 1943 they amounted to as much as $461,567. These grants have not, however, changed in any particular the original disposition of functions, stipulated by Enoch Pratt, as between City and Library Corporation.

In 1927 the City, thereunto authorized by state legislature (Act of 1927, Ch. 328) and by the vote of the citizens of Baltimore, incurred a bonded debt in the amount of $3,000,000 of which the amount of $2,925,000 was used for the acquisition by condemnation of additional real estate adjoining the Central Library building and for the construction thereon of a greatly enlarged and

improved Central Branch. When completed this new building was turned over to the Library Corporation for occupation and management.

Until about 1932 the City's grants in aid were made in the form of blanket appropriations and the money so provided was turned over to the Library Corporation in monthly installments to be expended and disbursed by it. Since that time there has been a change *in the form only* of handling these grants. By mutual voluntary arrangement with the City, the Library has requested this financial aid by submitting each year to its benefactor an itemized budget of its proposed expenditures for the ensuing year. Such budgets disclose not only the anticipated needs of the Library, but, as an offset thereto, the income which the Library receives in the form of fines levied by it upon borrowers for the overdue return of books. The function of this budget is merely to enable the City to determine how much money it should grant each year and to justify the overall amounts of such grants. The Board of Estimates of the City goes over this proposal and, of course, feels free to eliminate or reduce items therefrom which would cause the lump sum appropriation to be more than seems justified by the City's current financial situation, and the budget so agreed upon is incorporated in the City's annual Ordinance of Estimates.

About 1932 also, the Librarian recommended to the City that it establish salary classifications appropriate to the various employees of the Library, as far as possible in accordance with the regular salary schedule for municipal employees performing similar duties, and this was also done.

Another purely formal change in the fiscal arrangements, inaugurated about 1932, was an agreement between the Library Corporation and the City to utilize the

disbursing office of the City in the actual payment of the Library's bills and payroll. By this method the City retains the appropriated funds and disburses them upon bills incurred and approved by the Library. Thus the Library Corporation relieves itself of onerous accounting work, without sacrificing its function of determining what bills should be incurred, what staff should be employed and what salaries it should pay its employees.

The employees are not within the jurisdiction of the City Service Commission and are not required to take civil service examinations. As a result of their own pioneering they have been admitted by a Special Act of the Maryland Legislature (Act of 1939, Ch. 16) to the same general pension and retirement system which the City conducts for its own employees.

All of these arrangements were purely voluntary on the part of the Library Corporation and have had no effect whatever in impairing the managerial functions of the Library Corporation. The City has no right to, and does not attempt to, control its management in any way. The Library Corporation still determines in detail how its money is to be spent within the overall limits of the appropriations made for it. So long as it does not exceed the total appropriation, it is not required to conform to the items specified in the budget. It still determines how many and what books to buy, and still hires and fires the members of its staff without being subjected to any control by public or governmental authority. (See relevant excerpts on this subject from the testimony of Herbert Fallin, head of the City's Bureau of Accounts, and of Dr. Joseph L. Wheeler, the present Librarian, printed in Record pp. 114, 115, 120, 121, 122, 129, 130.)

The District Court in its opinion summarized the relations between the Library Corporation and the City as follows:

"(1) The management and operation of the Library is wholly committed to the Board of Trustees; (2) the title to all the property of the Library including its equipment of books and furniture, is vested in the City for the use of the Library; (3) the City is legally obligated to pay $100,000 a year to the Library in accordance with the Pratt and Carnegie gifts, but is not legally obliged to make any further appropriations for the Library; (4) nevertheless the City has for years past made additional voluntary appropriations to a very large amount, and (5) the City has no legal authority to supervise or in any way control the management of the Library by the Trustees with respect to appointments to staff positions or in the amount of annual expenditures, except by reducing partially or entirely the amount of its voluntary appropriations for the benefit of the Library."

B. The disposition by the Library Corporation of the application of the Plaintiff to be admitted to the library training class for prospective Pratt Library employees.

The Library now manages the Central Branch at Mulberry Street and Cathedral Street, and twenty-six other branches located in various sections of the City. In accordance with the expressed intent of Enoch Pratt, the Trustees have seen to it that the reading, book lending and other educational services of the Library have at all times been rendered to all members of the Baltimore public without any discrimination whatever. Several of these branch libraries are located in sections of the City where there is a large proportion of negro residents, but at only one branch, that known as Branch No. 1 located at Fremont and Pitcher Streets, are the patrons of the library predominantly colored. At Branch No. 1 the patrons are almost exclusively negroes.

The full-time employees of the Library, including the building staff, now number 285. Of these, approximately 70 are senior and 80 are junior "library assistants", professionally trained to aid and advise patrons in their selection of books. Negroes have been employed in ordinary course by the Library in minor capacities, but until 1942 they were not appointed to these professional positions having such close advisory contacts with the Library patrons. Beginning in 1942 the Board of Trustees, in the exercise of its managerial discretion, inaugurated the tentative and experimental policy of appointing qualified negroes to positions as junior library assistants at said Branch No. 1. Two such positions at that Branch were opened to negroes, and, as a result of competitive examinations, two educated negresses, already trained in library work, were appointed thereto, one in September 1942 and the other in February 1943. The policy under which this was done was clearly expressed in a resolution of the Board of Trustees, dated September 17, 1942, which read as follows:

> "Resolved that it is unnecessary and unpracticable to admit colored persons to the Training Class of The Enoch Pratt Free Library. The Trustees being advised that there are colored persons now available with adequate training for library employment have given the Librarian authority to employ such personnel where vacancies occur in a branch or branches with an established record of preponderant colored use."

Future policy toward the employment of negroes as "library assistants" awaits the result of this experiment.*

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* On this point Dr. Thomas S. Cullen, President of the Board of Trustees, testified:

> "We had no colored people up to a year or two ago, and then we put two in the Pitcher street branch because of the majority of the people there were colored, and we do not know what turns the city will take in the future, so we can not be positive about the future." (Record, p. 162.)

The District Court in its opinion found that:

> "the Trustees have exercised their judgment in this matter in the past in good faith and not with any personal hostility to or prejudice against the Negro race. And it also appears that they have an open mind for the future as to the desirability of appointments of additional young Negresses of suitable qualifications to technical staff positions where it is found in the interest of good public service, considering particularly the predominant character of the patronage of the particular branch library . . ."

Albert D. Hutzler, a Trustee, testified:

"The question was brought up and discussed more than once, and it was felt that perhaps we could experiment slowly and see what developed. In the first place, selected according to where the branch is, and there was only one which was preponderantly colored in patronage. It was felt by the Trustees that service with colored librarians was not what was wanted by the users of the Pratt Library, and we felt it was something that should be worked out slowly. There are certain problems to be met. While no promises were to be made, and it was definitely stated to Mr. Wheeler that no promises were to be made, if the thing was successful we would take the next step after the first step worked all right, and that is the reason the Pitcher street branch was selected as the first one, and we first put one in and then a second was put on, and things were working out in such a way that perhaps a third step will be taken, but, again, no action has been taken by the Trustees.

"Q. The Board of Trustees has made no commitments as to its future policy?

"A. Has made no commitment either positive or negative as to the future policy.

"Q. So that the instruction contained in the resolution passed by the Board on January 21, 1943, directing that Mr. Wheeler is to make no promises or commitments beyond that, that resolution was passed because of the fact that there was no policy fixed by the Board?

"A. It was taken because the Board wanted to leave itself for power of action as events developed." (Record, p. 176.)

Robert W. Williams, a Trustee, testified:

"Q. Your decision, then, was based on the fact that there were no positions to which negroes were eligible, to which this girl could be appointed if she finished the course, is that correct?

"A. That is true, Mr. Houston. At that time I think we felt we were starting on a course of action which we hoped would be successful, and we did not feel it could be successful if it were advanced too rapidly, and I don't think any of us know just how far or how rapidly we can proceed along this line." (Record, p. 184.)

Since the year 1928 the Library has conducted each year a training class, not to furnish training for general library work or as part of the general education advantages offered to patrons, but solely an intra-mural arrangement to give preliminary training to small groups of suitable persons from which, after completion of the course, appointments could be made to vacancies occurring in the positions at the Enoch Pratt Library of "junior library assistants". The requirements for admission are described in a circular received in evidence. The preferred preparation for admission to the class is a college degree representing a scholasic average of 80% for the entire course, but such exacting qualifications are not being insisted upon. The committee of the Librarian's staff passes on the qualifications of applicants and selects the most likely candidates on the basis of education, health and personality. They have usually selected an average of 15 to 18 students for each class. Graduates are expected to accept positions with the Library if offered, and vacancies in the position of library assistants are usually recruited from the graduates. Since the course includes some part time work in the Library, the members of the class receive compensation after a short initial training period.

Negroes have not been admitted to the training class because of the abundance of negroes already trained in library work available at the only two such positions so far open to them at Branch No. 1.

On April 23, 1943, appellant Louise Kerr, a well-educated negress, possessing the purely educational requirements, applied in person to Harry L. Hamill, assistant librarian of the Library, to be admitted to the training class beginning July 15, 1943. At that time there were no vacancies in the only two positions of junior library assistants which were open to and already filled by negroes. In view of that situation and the fact that there

were available an ample number of qualified negresses for those positions, the applicant was denied admittance to the training class. Thereupon her counsel, on June 28, 1943, sent a formal demand to Dr. Thomas S. Cullen, President of the Board of Trustees of the Library, that she be admitted, contending that she had been refused solely because of her color and that such refusal constituted an unlawful discrimination against her. To this demand Dr. Cullen, on July 7, 1943, replied as follows:

> "I have your letter of June 29th. You are mistaken in stating that Miss Kerr was refused admission to the library training course solely because of her race. As you know, the Pratt Library has appointed librarians of the colored race, as well as of the white race.
>
> "The Trustees of the Pratt Library have, after careful consideration, determined what librarian positions are available for members of the colored race, and what librarian positions are available to the white race. At the present time there are no openings or vacancies among those positions filled by, or available for, members of the colored race. The Librarian tells me there is no likelihood that there will be vacancies in those positions in the near future.
>
> "Mr. Wheeler tells me that this was explained to all persons of the colored race applying for admission to the library training course in the spring, and it was also pointed out to them that the library training course was maintained by the Library to train persons to fill vacancies on the Pratt Library staff. The library training course is not designed, and can not undertake, to train persons generally in library work for positions elsewhere.
>
> "Under those circumstances, and since no opening as librarian on the staff of the Pratt Library is, in the immediate future, available, the admission of Miss Kerr to the library training course, and her work in that course, could result only in an unhappy and unprofitable waste of her time."

There is no question but that, as the District Court found, the reasons given by Mr. Hamill and Dr. Cullen to the plaintiff for refusing her application were *bona fide*. A number of trustees testified without contradiction that Dr. Cullen's letter accurately described the policy and attitude of the Board. On the evidence the District Court justifiably found as a fact

> "that the reason given by the management of the Library for its refusal to consider her application was genuine and in good faith, and not solely by reason of her race or color." (Record p. 27.)

And also found

> "The policy and practice of the Library management in selecting only white persons for its technical staff (with the exception mentioned) had not been due to any personal prejudice or discrimination by the Trustees on account of race or color, but in the exercise of their best judgment in the selection of employees in the interest of the public service to be rendered, and in consideration of the fact that the largely predominant patronage of the main and branch libraries (with the one exception mentioned has been by white persons." (Record p. 22.)

Decision of the Circuit Court of Appeals.

The Circuit Court of Appeals held that it was necessary to consider only two of the defenses that had been made, namely, (1) that the plaintiff was not excluded from the Training School solely because of her race and color, and (2) that the Library is a private corporation, controlled and managed by the Board of Trustees, and does not perform any public functions representative of the State. It held that there could be no doubt notwithstanding the finding to the contrary by the District Court in an elaborate opinion that the applicant was excluded from the class because of her race and as to this contention, it said—

> "The view that the action of the Board in excluding her was not based solely on her race or color rests on the contention that as the only positions as librarian assistants, which are open to Negroes, were filled at the time of her application, and as a number of adequately trained colored persons in the community were then available for appointment, should a vacancy occur, it would have been a waste of her time and a useless expense to the Library to admit her. The resolution of Septmeber 17, 1942, and the testimony given on the part of the defendants indicate that these were in fact the reasons which led to the plaintiff's rejection, and that the trustees were not moved by personal hostility or prejudice against the Negro race but by the belief that white library assistants can render more acceptable and more efficient service to the public where the majority of the patrons are white. The District Judge so found and we accept his finding. But it is nevertheless true that the applicant's race was the only ground for the action upon her application. She was refused consideration because the Training School is closed to Negroes, and it is closed to Negroes because, in the judgment of the Board, their race unfits them to serve in predominantly white neighborhoods."

After citing decisions by the Court of Appeals of Maryland, the highest court of the State, which had been cited by the District Court in support of its finding, the Circuit Court of Appeals then said:

> "These decisions are persuasive but in none of them was the corporation under examination completely owned and supported from its inception by the state as was the library corporation in the pending case."

It is to be noted that the original Library costing $225,000 together with $833,333.33, was given to the City by the donor subject to the trust that its management be in

a self-perpetuating board of trustees and that the board should have sole control with respect of the selection of the employees; it is true that subsequently the City appropriated almost $3,000,000 for the erection of a new building, the old building being incorporated in it and that the funds for its maintenance and support are contributed largely by the City. The decision leaves no criterion by which to judge of the extent of ownership of property of an institution which receives grants in aid or the extent of the grant in aid that will convert a private institution into a state agency.

In the opinion, the statement is made that the donor could have formed a private corporation with power to own the property and manage the business of the Library independently of the State and that the donor—

> "* * *. * * * chose instead to seek the aid of the state to found a public institution to be owned and supported by the city but to be operated by a self-perpetuating board of trustees to safeguard it from political manipulation; and this was accomplished by special act of the legislature with the result that the powers and obligations of the city and the trustees were not conferred by Mr. Pratt but by the state at the very inception of the enterprise."

Rather is it true that the City in lieu of expending the money which in 1882 when the Library was given to the City, was a very great sum, elected instead, to look to an individual and accepted the property on conditions which safeguarded to the individuals selected by the donor and to their successors the management of the enterprise which at its inception was paid for solely by him; the fact that subsequently the enterprise was extended at the expense of the City rather than that the City embark upon an independent enterprise to accomplish the same purpose is no ground for holding that the trusts

under which the City acquired the property are not binding on it.

In the interest of encouraging contributions to eleemosynary institutions which perform in part, obligations of the State, it is of great importance that prospective donors know whether the terms under which the public body accepts gifts are to be binding or are not to be binding and what are the criteria by which such donors can be guided in deciding the binding or the non-binding effect of agreements under which private funds may be advanced for public or semi-public work.

ARGUMENT.

I.

The Refusal of the Library Trustees to Admit Plaintiff Louise Kerr to the Library Training Course Was Not State Action.

1. The constitutional and statutory prohibitions against discrimination have to do with State action only.

> *Fourteenth Amendment*, Sect. 1;
> *Civil Rights Act*, U. S. C. A. 8, Sect. 41, 43;
> *United States v. Cruikshank*, 92 U. S. 542;
> *Strauder v. West Virginia*, 100 U. S. 303.

If the wrongful act is—

> "not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress."
> *Ex Parte, Virginia*, 100 U. S. 339.

2. It is for the courts to determine, on the facts of the particular case presented, whether the act complained of was action by the State.

"But to constitute such unjust discrimination the action must be that of the state. Since the state, for present purposes, can only act through functionaries, the question naturally arises what functionaries, acting under what circumstances, are to be deemed the state for purpose of bringing suit in the federal courts on the basis of illegal state action."

"It (the problem) is not to be resolved by abstract considerations such as the fact that every official who purports to wield power conferred by a state is *pro tanto* the state."

Snowden v. Hughes, 64 S. Ct. 397, 405.

3. Although the question is a federal one, applicable decisions of the State Court although not conclusive, are persuasive.

The fact that the City contributes to the carrying on of the work and that the activities conducted by the Library Corporation are such as may be and in many instances, are conducted by the State and are of the kind generally denominated governmental activities, does not make them State activities or make it a State agency. The giving of State aid to private institutions (hospitals, orphan asylums, homes for the aged, welfare institutions, reformatories) is universal throughout the State and the Nation. Chapter 710 of the Acts of 1943 provides for State aid to a total of 100 institutions, including 31 general hospitals, 5 hospitals devoted to the care of special types of invalidism, 11 homes for the aged and infirm, 15 institutions for dependent children, 4 agencies for dependent children, 4 day nurseries, 4 convalscent homes, 1 institution devoted to the care of crippled children, 3 schools for the blind, 8 educational institutions and 5 miscellaneous institutions charged with the care of delinquents. Each of these institutions exercises functions and performs services which can be and usually are performed by the State; the fact does not consti-

tute their activities State action; nor does the contribution to their maintenance and upkeep, to assist them in the carrying on of the work entrusted to them; the State contributes to the cost of the carrying on of the activities of the Library Corporation in lieu of carrying on the same by an independent and separate State agency or department. There is no support in law for the contention made by the Plaintiff that the carrying on of activities of the kind usually carried on by the State constitutes State action.

That the State elects not to carry on in its own name and through officers subject to its control and supervision, activities such as are conducted by the Library Corporation but elects in lieu thereof to contribute to the carrying on of such activities by the Corporation, in no sense changes the character of the Corporation and converts its activities from private activities to State activities and no authority, it is submitted, so holds. Manifestly, as repeatedly alleged by Plaintiff, private persons exercising governmental functions are subject to constitutional restraints; they are oftentimes subject to constitutional restraints whether they do or do not exercise governmental functions if the facts are apposite.

The right of the State to make appropriations for private institutions is not subject to question in Maryland and the making of the same does not affect the character of the recipient, under the decisions of the Court of Appeals in *Finan v. Cumberland,* 154 Md. 563, *St. Mary's Industrial School v. Brown,* 45 Md. 310, *Clark v. The Maryland Institute,* 87 Md. 643.

The Plaintiff cited decisions of the Supreme Court in three cases—Nixon v. Condon, 286 U. S. 73, Smith v. Allwright, 321 U. S. 649, and Steele v. L. & N. R., 323 U. S. (Dec. 18, 1944), as authority for the contention on which she so largely relies, i. e., that the exercise of a

governmental activity makes the act done, State action within the prohibition of the amendment; the facts are so different from those in the instant case, that the decisions are not applicable precedents. In Nixon v. Condon, the State of Texas had provided by statute, that every political party, through its executive committee, should have the power to prescribe the qualification of its own members and determine who should be qualified to vote as a member of such political party. The Court held as to the executive committee that—

> "They are then the governmental instruments whereby parties are organized and regulated to the end that government itself may be established or continued."
>
> "Whatever power of exclusion has been exercised by the members of the committee has come to them, therefore, not as the delegates of the party, but as the delegates of the State. Power so intrenched is statutory, not inherent. If the State had not conferred it, there would be hardly color of right to give a basis for its exercise.
>
> * * * * * *
>
> "* * * The pith of the matter is simply this, that when those agencies are invested with authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power."

In Smith v. Allwright, 321 U. S. 649, again a Texas statute was involved, which provided that all white citizens should be eligible to membership in the Democratic party. In holding that negroes could not be so barred from membership, the Court again based its decision on a finding specifically that the party was by statute a State agency.

> "We think that this statutory system for the selection of party nominees for inclusion on the general

> election ballot makes the party which is required to follow these legislative directions an agency of the State in so far as it determines the participants in a primary election."

and again—

> "But when, as here, that privilege (the privilege of membership in the party) is also the essential qualification for voting in a primary to select nominees for a general election, the State makes the action of the party the action of the State."

The holding in the cast last referred to, Steele v. L. & N. R., is not relevant on the facts, we respectfully submit.

Whether certain action is State action or not, is not dependent upon whether in the taking of such action, the party concerned is exercising functions which the State may also exercise but whether the person exercising the function does so by virtue of a public position under a State government. *Raymond v. Chicago Traction Co.*, 207 U. S. 20, at page 36:

> "whoever by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition; and as he acts in the name of the State and for the State, and is clothed with the State's powers, his act is that of the State."

The test as to whether the Library Corporation is a public one or a private one, from which to judge whether its acts are private or public, depends upon whether (1) the Trustees were appointed by public authority, (2) are subject to removal by, and (3) control of the public authority.

It is true that the question must be decided by the federal courts as a federal question but the decisions of

the Court of Appeals of the State are persuasive as to the correctness of the contention that the Library Corporation is a private and not a public institution.

The Maryland Institute was held to be a private institution although it received municipal aid, and its action in excluding colored pupils was held not to violate the 14th Amendment. *Clark v. Maryland Institute,* 87 Md. 643.

On the other hand, the Law School of the University of Maryland, being a State agency by consolidation with Maryland State College of Agriculture, and being under one and the same Board of Trustees, appointed and controlled by the State, is a State institution, and must furnish equal facilities for negroes.

In *Dartmouth College v. Woodward,* 4 Wheat. 518, 671—

> "When the corporation is said, at the bar, to be public it is not merely meant that the whole community may be the proper objects of the bounty, but that the government have the sole right, as Trustees of the public interests, to regulate, control, and direct the corporation and its funds and its franchises at its own good-will and pleasure."

See also:

St. Mary's School v. Brown, 45 Md. 310;
University of Maryland v. Williams, 9 G. & J. 365, 397;
Trustees v. Indiana, 14 Howard 268, 276;
Fletcher, Cyc. Corp., Vol. 1, p. 194.

In *Finan v. Cumberland,* 154 Md. 563, it was held that if there is legislative authority for so doing, public funds may be used by a municipality in the erection or maintenance of a general hospital, and such use of public funds does not make the institution a public corporation. The hospital was a private corporation—

> "for it was regularly organized as such, elects its own managers, and is in no way subject to public authority or control."

St. Mary's Industrial School for Boys, St. Mary's Industrial School for Girls, St. Vincent's Infant Asylum, and The Maryland Institute were all held to be private institutions and that the City could not appropriate public funds for their support without legislative sanction. In *St. Mary's Industrial School v. Brown,* 45 Md. 310, the Court said at page 329—

> "They do not owe their creation to the municipal power conferred upon the City of Baltimore, and were not created for the City by the Legislature of the State as instruments of municipal administration. They are separate and distinct corporations composed of private individuals, and managed and controlled by officers and agents of their own, and over which the City has no supervision or control, and for the management of which there is no accountability to the City whatever. No ordinance or resolution of the City Council can control the powers and discretion vested in the managing boards of these institutions, nor have the Mayor and City Council the power to determine who shall and who shall not receive the benefit of the charities dispensed by them."

The fact that the State appointed ten and the City five of a Board of thirty trustees of one of these corporations did not make it a public corporation; nor did the fact that the City owned the ground upon which the building of another of these corporations was erected make it a public corporation.

The case of *Johnson v. Baltimore,* 158 Md. 93, which is the only case in which the status of the Library has been raised, does not purport to declare that the Library is a public institution.

In this case, there was a petition by the City to condemn property to be used for a public library. One of the grounds on which the petition was opposed was that the City proposed to turn the property over to the Enoch Pratt Library, a private corporation. It was held that the City had the power to condemn property for a free public library since the maintenance of such an institution was an integral part of free public education and thus a proper municipal purpose and a public use. The Court said at page 104—

> "The proper test is not whether the agency is public but whether the purpose is public within the legitimate functions of our Constitutional Government."
>
> *LaCross Public Library v. Bentley,* 163 Wis. 632.

Evidence that the City proposed to turn the property over to the Enoch Pratt Free Library was excluded on the ground that the propriety of such action was not before the Court in this case.

One of the earliest and probably one of the best statements of the distinction between a private and a public institution is in the opinion in *University of Maryland v. Williams,* 9 G. & J. 232, at page 398—

> "A public corporation is one that is created for political purposes, with political powers, to be exercised for purposes connected with the public good in the administration of civil government; an instrument of the government, subject to the control of the Legislature, and its members, officers of the government, for the administration or discharge of public duties * * *."
>
> "If eleemosynary and private at first, no subsequent endowment of it by the State, could change its character and make it public."

The relation of the Library to the State meets none of these requirements.

The relation of the Library Corporation to the City is set out in the following Acts of the Legislature and Ordinances of the Mayor and City Council of Baltimore:

Acts of 1882, Chapter 181. (Record p 191.)
Ordinances of the Mayor and City Council of Baltimore—
No. 106 approved July 15, 1882. (Record p. 193.
No. 275 approved May 11, 1907. (Record p. 196.)
No. 1195 approved Dec. 16, 1930. (Record p. 199.)

and in the Indenture from Enoch Pratt and wife to the Mayor and City Council of Baltimore, dated July 2, 1883, and the Baltimore City Charter, Sect. 6 (14A), Sect. 969 and 971. (Record p. 211.)

The Act provides by Section 2 thereof that the nine individuals therein named—

> "and their successors, be and they are hereby constituted and appointed the Board of Trustees of 'The Enoch Pratt Free Library of Baltimore City'; and they and their successors are hereby constituted and appointed a body politic and corporate by the name of 'The Enoch Pratt Free Library of Baltimore City,' with power and are required to fill any vacancies in said Board occurring by resignation, disability or otherwise, and to perform their succession, and to do all necessary things for the control and management of said Library and its branches, and * * * to make all necessary by-laws and regulations for the government and administration of said trust and for the appointment of the necessary officers and agents: * * *."

Ordinance No. 106, approved July 15, 1882, after reciting the Act of the Assembly, authorized the acceptance of the proposal of Enoch Pratt to convey to the City library building, estimated to have cost $225,000 and to endow it by the payment to the Mayor and City Council, of $833,333.33.

The Library was deeded to the City and the sum of $833,333.33 was given to it, on the condition that the sole management should be in the Trustees, a self-perpetuating board. The fact that the City contributes largely to the maintenance and that it has defrayed the cost in large part, of the existing main library building, does not make the Institution a State agency. Were contributions the test, then all State aid institutions would be public institutions and the anomalous situation would be presented of characterizing as State action, creating State liability, the activities of 100 corporations receiving State aid over which the State has no control as to the selection or tenure of office of the members of their governing board or as to the management thereof.

In order that the activities of the Library Corporation may be held to be State activities, it is, of course, not necessary that the Trustees be agents of the State in a strict sense in which an agent represents his principal; it is submitted, however, that the Library Corporation and its relation to the public have no elements of agency or representation of the public by the Trustees save only the fact that the City is the owner of its property and contributes in large part, to its maintenance and upkeep.

The City did not create the library; the Trustees were not appointed by it nor are they subject to its control; the City has simply elected, in lieu of building and maintaining the library at its own expense, to make a contribution to the existing Library, without disturbing in any way the management by the Trustees; the City exercises no right to appoint or to remove a trustee, it exercises

no rights with respect of the policy of the Trustees in the management of the Library, and it is not liable for its debts. (Record p. 130.) Its relation is solely that of a contributor of a part of the maintenance cost and that contribution in part is made pursuant to contract whereby the City acquired the original library and almost $1,000,000 from Mr. Pratt and $500,000 from Mr. Carnegie by gifts that expressly provided that the Institution should be a private one.

In concluding this branch of the argument, we respectfully submit that even if it be admitted that the action of the Trustees in making selections of those to be admitted to the Training Class or in choosing employees, is State action, their authority still appears to be unquestioned under the decision in *Heim v. McCall*, 239 U. S. 175, and *Atkin v. Kansas*, 191 U. S. 207. The doctrine of these cases is that the state, in spending the public's money and administering their property, may deal with whom it chooses, select its own employees and prescribe the conditions of their employment, without denying due process or failing to afford the equal protection of the law. These cases do not, it is true, involve negroes but aliens and citizens of other states, but aliens are guaranteed due process and equal protection under the Fourteenth Amendment. *Yick Wo v. Hopkins*, 118 U. S. 356, 369.

II.

There Was No Discrimination Against the Plaintiff Louise Kerr Because of Her Race or Color, With Respect of Her Application For Admission to the Training Class.

If it be found that the Library is a State agency, the complaint should nevertheless be dismissed, for the plaintiff, Louise Kerr, was not discriminated against with

respect of her application to be accepted for the Training Class solely on account of her race or color.

It is true that the Board of Trustees of the Library at a meeting held on September 17th, 1942, did pass a resolution, recited in the complaint—

> "that it is unnecessary and unpracticable to admit colored persons to the Training Class of The Enoch Pratt Free Library. The Trustees being advised that there are colored persons now available with adequate training for library employment have given the Librarian authority to employ such personnel where vacancies occur in a branch or branches with an established record of preponderant colored use."

The Trustees were charged with the duty of operating the library; it was their duty to appraise the nature of the work that was to be done and their right to determine what type of employee could best do it. At the time the application for appointment to the Training Class was made by Louise Kerr, it was the judgment of the Board of Trustees that the purpose of the library could best be served by limiting the employment of negro librarians to a branch which was patronized largely by negroes; and inasmuch as there were then available, sufficient negroes to fill the places which had been determined could be filled by colored persons, there was no discrimination involved in not accepting her application.

What then was the nature of the training class to which the Plaintiff sought admission and what was the action of the Trustees upon which the Plaintiff bases her claim of prohibitive discrimination?

The Training Class is not an institution to train librarians as such; it is an adjunct of the Enoch Pratt Free Library and is conducted solely for the purpose of training persons to take positions in the Library; the circular

of information with respect to the Training Class expressly so provides—

> "* * *. Applicants should consider carefully the distinction between a training class such as that of the Pratt Library, and a full-time library school accredited by the American Library Association. Training classes prepare workers for positions only within the library for which the class is organized. * * *"

It was inaugurated in 1928. Its function was described by the Librarian, Dr. Wheeler, to be this:

> "* * *. This is a training class in order to prepare persons to be employees of the Enoch Pratt Free Library itself, and one admitted to the training course has an understanding with us that they will complete the course, and if we consider that they are qualified to complete it and upon graduation from the training course, they will be appointed to the Pratt Library staff if we think at that time that they are suitable * * *.
>
> "Their duty is to work with the public in helping them to find what they want and in seeing that the public wants the proper books; in other words, what we call professional positions as contrasted with clerical positions."

In reply to a question—

> "In other words, the positions you are training for in the training courses are more advanced with respect to the knowledge of books than the mere physical act of getting a book from the shelf and giving it to a borrower?"

he replied—

> "It is a question of book knowledge and the ability of the staff to help the public find what it wants." (Record pp. 72, 73.)

The training class was, therefore, not a school but an adjunct or department of the Library organized solely for the purpose of training those who were to become its employees and those employees were to be selected not only on the basis of their intellectual qualifications but on the basis of their qualifications as advisers to those who sought their assistance in helping them find what they wanted and in seeing that the public got the proper books; they were to be trained for professional rather than for clerical positions and it was incumbent upon the Board, it is submitted, to limit their selections for the training class, to those who in their opinion, were not only intellectually qualified but to those who in the opinion of the Trustees could best serve the patrons of the Library. The contention of the Plaintiff rests on the assumption that the sole qualification is the ability to meet the physical and mental requirements of the training class; that personality and availability for the work to be done could not be considered, and that the employer could exercise no discretion as to the type of employee to be selected; that is not correct; the class was not for the purpose of training librarians as such; it was solely for the purpose of providing employees for the Library. In making the appointments to the training class, the Trustees were, therefore, making appointments of prospective employees and it was incumbent upon them to exercise the same discretion that they would use in employing a librarian. The assistant librarians are to serve the public and it was the duty of the Trustees to procure as librarians, those who would supply the public's needs. If in their judgment, a white librarian could better meet those needs than one who was colored, although they were otherwise equally well qualified, it was not only the right but the duty of the Board of Trustees to select the white applicant. Inasmuch as in the judgment of the Board of Trustees when the application was made, there was no

position to be filled which a colored woman could fill as acceptably as a white woman, the decision could not be deemed to be a discrimination against a colored applicant by reason of her race or color.

The record justifies the finding of the Lower Court, namely—

> "that the reason given by the management of the Library for its refusal to consider her application was genuine and in good faith, and not solely by reason of her race or color. This findings of fact would seem to be conclusive in favor of the defendants on consideration of the complaint as literally framed."

The Librarian, Dr. Wheleer, the President of the Board of Trustees, Dr. Thomas Cullen, and two members of the Board of Trustees, Mr. Albert Hutzler and Mr. Robert W. Williams, testified as to the position of the Trustees. Their testimony was supplemented by the introduction of correspondence with respect to the admission of negroes to the training class and the introduction of excerpts from minutes of meetings of the Board of Trustees of the Library. This evidence was substantially this:

The Librarian was asked whether the Board had any established policy with regard to when and where and under what circumstances negroes will be appointed as library assistants. He replied—

> "It would interpret my instructions to proceed with a good deal of care and to feel our way along and see how we get along with this employment of colored assistants. It has been going on now for only a year and a half." (Record p. 84.)

Dr. Cullen, the President of the Board of Trustees, and the other two members of the Board, Mr. Hutzler and

Mr. Williams, testified as to the policy substantially as follows:

> "We had no colored people up to a year or two ago, and then we put two in the Pitcher Street branch because of the majority of the people there were colored, and we do not know what turns the City will take in the future, so we cannot be positive about the future." (Dr. Cullen—Record p. 162.); see also letter from President of the Board of Trustees to counsel for the applicant of July 7, 1943—Record p. 164.)
>
> "The question of colored librarians, as we have heard in the previous testimony, is a question that has been up before the Trustees for quite some time. * * *—it wasn't a question of employment, but a question of service to the patrons of the Library. * * * The question was brought up and discussed more than once, and it was felt that perhaps we could experiment slowly and see what developed. * * * While no promises were to be made, and it was definitely stated to Mr. Wheeler that no promises were to be made, if the thing was successful we would take the next step after the first step worked all right, and that is the reason the Pitcher Street branch was selected as the first one, * * *. The Board has made no commitment either positive or negative as to the future policy." (Mr. Hutzler—Record p. 176.)
>
> "Nobody has been denied training because they were negroes. They have been denied training because there was no position for them at the end and we only train for position." (Mr. Hutzler—Record p. 180.)

To the same effect was the testimony of Mr. Robert W. Williams, the third member of the Board of Trustees who testified. (Record p. 183.)

The action of the Trustees with respect to the employment of negroes as disclosed by the historical record,

bears out the testimony of the Librarian and the Trustees.

The record shows that there has been no discrimination against the employment of negroes as librarians generally. On the contrary, two negresses have been appointed to that position in Branch No. 1, the patrons of which are predominantly colored and the undisputed testimony is that the Trustees having made that beginning, are "feeling their way" with respect to extending such employment. The discrimination alleged in the refusal to receive the Plaintiff's application for admission to the training class is answered and, we submit, denied by the record. It is true that at the time the suit was instituted, and it is true today, that negroes will not be admitted to the training course as long as in the opinion of the Trustees, there are sufficient qualified negroes available to fill the positions which the Board in its judgment, thinks can be best filled by the negroes and as long as in the judgment of the Trustees, the positions that they have open can be best filled by white people. If there are two people equally qualified and available for a position that is to be filled, one a negress and one a white woman, it is no discrimination against the negro because of race, if the Trustees select a white woman because they feel that because of her color she is more efficient for the purpose for which they want her. It is not prejudice if the basis for the selection and the distinction is the honest desire to get the more efficient person for the work to be done; that is the position of the Trustees and, we submit, it should be sustained.

In *Mills v. Lowndes*, 26 Fed. Supp. 792 at 803, in an opinion by Judge Chesnut, the trial judge, it was held that each County Board of Education in the State—

> "may in the exercise of its lawful discretion decide whether to employ white or colored teachers for the

> colored schools; nor is it required to employ any particular teacher, whether white or colored, although duly qualified."

And again in an opinion by Judge Chesnut in *Mills v. Board of Education of Anne Arundel County,* 30 Fed. Supp. 245 at 249:

> "It does not follow that because the positions are equivalent the particular persons filling them are necessarily equal in all respects in professional attainments and efficiency; and some range of discretion in determining actual salaries for particular teachers is entirely permissible to the County Board of Education."

In both opinions, the Court held that a distinction could be made on the ground of difference in professional qualifications although professional qualifications are in the main susceptible of standardization and ascertainment through examinations. It is submitted that far greater latitude should be permitted to the Library Trustees in the selection of employees who are to serve the public generally, of all races and faiths.

III.

The Order of the Lower Court Dismissing the Fourth Count Generally, Should Have Been Affirmed.

The Fourth Count does not present a federal question but one that is primarily a State law.

> *Hydraulic Press Mfg. Co. v. Columbus Malleable Iron Co., et al.,* 35 Fed. Supp. 603;
> *Rules of Civil Procedure,* 18 and 20.

There is no diversity of citizenship but the Plaintiff contends that the charge that public moneys to which he

contributes, are being spent by the City without authority and that his property is, therefore, being taken without due process of law as to him sustains the jurisdiction. We repeat that this is a question of State law, that there is no diversity of citizenship and that the Court had no jurisdiction to determine it; in its opinion, the Lower Court found as well that if a federal question did exist, it was unsubstantial.

Under the State law, the City and any other municipal corporation of the State, may appropriate public moneys for use by private corporations if thereunto duly authorized by the Legislature. (For authorities, see this Brief, p. 25.)

The Legislature has authorized the City to make the appropriations to the Library—City Charter, Sect. 14A (Record p. 218.)

Respectfully submitted,

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